Supreme Court, U.S.
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No. 92-0179

In The

Supreme Court of the United States

October Term, 1992

WISHBONE, INC., a Colorado corporation; JOSEPH LOCHI; and, FRANCIS LOCHI,

Petitioners,

v.

LULA M. EPPINGER, Personal Representative of the Estate of Wilmer H. Eppinger,

Respondent.

Petition For Writ Of Certiorari To The Colorado Court of Appeals

BRIEF IN OPPOSITION

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22

TABLE OF CONTENTS

Page

I. RESPONDENT'S STATEMENT OF THE CASE . 1

II. SUMMARY OF RESPONDENT'S ARGUMENT 2

III. RESPONDENT'S ARGUMENT – REASONS FOR DECLINING TO GRANT THE WRIT ... 4

(a) C.R.S. 15-12-803 and 804 constitute a self-executing non-claim statute, and, as such, are not affected by due process requirements of the Fourteenth Amendment ... 4

(b) Due process under the Fourteenth Amendment..... 7

(c) The non-claim period of C.R.S. 15-12-803.. 8

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Matter of Estate of Daigle, 634 P.2d 71 (Colo. 1981) 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950)..... 7

Texaco, Inc. v. Short, 454 U.S. 516, 70 L.Ed.2d 738, 102 S. Ct. 781 (1982).....4, 8

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 99 L.Ed.2d 565, 108 S. Ct. 1340 (1988)..... 4, 5, 7, 8, 9, 10

RULES

Rule 10, Rules of United States Supreme Court 10

COLORADO STATUTES

C.R.S. 15-12-801 .....2, 5

C.R.S. 15-12-803 ..... *passim*

C.R.S. 15-12-804 .....3, 4, 6, 7, 8

I. RESPONDENT'S STATEMENT OF THE CASE

Respondent Eppinger incorporates by reference as her statement of relevant facts the trial court's Finding of Facts which are summarized in the decision of the Colorado Court of Appeals, a copy of which is attached as Appendix A to the Petition for Writ of Certiorari, and which for convenience respondent also attaches as Appendix A to this response. Specifically, respondent wishes to point out to this Court that petitioners' statement of the case fails to reflect certain of those important facts (Appendix A, pgs. 1-3), as follows:

1. The receipt and option contract between the petitioners and Wilmer Eppinger called for the property to be conveyed free and clear of all liens, encumbrances, and easements *except those of record*. Pursuant to that contract, Mrs. Eppinger, the respondent, who was appointed in March of 1988 as personal representative of the estate of Wilmer Eppinger, executed a deed to the petitioners conveying said lots 9 and 10, except certain matters which had long since been of record. Of critical importance is the undisputed fact that the petitioners knew, when they accepted the deed, of Mr. Eppinger's death, of the existing probate proceedings, and of Mrs. Eppinger's appointment as personal representative of the estate and her delivery of the deed to the property in that capacity. Petitioners accepted the deed and tendered the purchase price as agreed, and claim it was only later that day of closing they discovered that only 1.711 acres was actually conveyed. Upon presentation of their claim to the personal representative, respondent's attorney responded (the July 15, 1988 letter) to petitioners' claim in what the trial court determined was a notice of disallowance of the

claim, informing petitioners "that you do not have grounds for any lawsuit against the estate". The decision of the Colorado Court of Appeals, which the Colorado Supreme Court declined to review, makes very clear that C.R.S. 15-12-803 requires that such claims against the estate must be filed within four months after performance by the personal representative was due or the court loses jurisdiction to determine the claim, and that the claim was not filed within that period. Since the performance by the personal representative was due on the same date that the petitioners claim they first discovered what they allege to be a breach of that performance, the petitioners had four full months in which to file their lawsuit. The facts are also clear that since the petitioners' attorney promptly received a response to the claim submitted to the personal representative, the petitioners had almost three full months from the date that their claim was denied within which to file their lawsuit.

II. SUMMARY OF RESPONDENT'S ARGUMENT

This case involves the application of the Colorado Probate Code non-claim statute, C.R.S. 15-12-801 et seq. The trial court granted respondent Eppinger's Motion for Summary Judgment dismissing all of the petitioners' claims on the basis that petitioners did not comply with the provisions of this statute. Under the non-claim statute, claimants must do two things. First, they must present a claim within four months after performance by the personal representative is due. Secondly, if the claim is disallowed, they must commence a proceeding on the claim within either that four month period or a 60 day

period, depending upon the circumstances of the disallowance. The trial court concluded that a claim was presented in early July, 1988, at which time petitioners were fully aware of the underlying facts on which they based their claim. The claim was disallowed on July 15, 1988. A proceeding on the claim was not commenced until December 30, 1988, approximately six and one-half months after the performance by the personal representative was due. On this basis, the trial court properly dismissed all of petitioners' claims against respondent for failure to comply with the non-claim statute.

C.R.S. 15-12-803 and 804 constitute a self-executing non-claim statute. That is, the non-claim statute is triggered only by the date on which performance is due with respect to claims based on contracts with the personal representative, and triggered only on the date of the acts which give rise to the claim in all other cases. There is no significant state involvement in triggering the non-claim statute, and, therefore, the Fourteenth Amendment's due process clause is not implicated. Even if the Fourteenth Amendment's due process clause was implicated, the issue is moot because the plaintiffs had actual knowledge of the pendency of the estate proceedings when their alleged cause of action arose. In light of the purpose behind the four month non-claim provision of C.R.S. 15-12-803 (to satisfy the needs of the heirs and devisees of a decedent through an expeditious distribution of property), and especially under the circumstances of this case where no fundamental unfairness exists, the non-claim statute does not deny due process.

III. REASONS FOR DECLINING TO GRANT THE WRIT

a. C.R.S. 15-12-803 and 804 constitute a self-executing non-claim statute, and, as such, are not affected by due process requirements of the Fourteenth Amendment.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 99 L.Ed.2d 565, 108 S. Ct. 1340 (1988), relied upon by petitioners, involved an issue of whether Oklahoma's two month probate non-claim statute which was triggered by publication of notice to creditors violated due process under the Fourteenth Amendment. The U.S. Supreme Court, while reaffirming that a cause of action is property protected by the Fourteenth Amendment's due process clause, qualified its operation.

> "The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state – sanctioned private remedies or procedures does not rise to the level of state action . . . . Nor is the State's involvement in the mere running of a general statute of limitations generally sufficient to implicate due process . . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found . . . . The question here is whether the State's involvement with the non-claim statute is substantial enough to implicate the Due Process Clause." [pp. 484, 485].

Reaffirming the principles set forth in its decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L.Ed.2d 738, 102 S. Ct. 781 (1982), the Supreme Court stated in unmistakably clear language that

> *"due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations . . . "* [Emphasis supplied.] [p. 486].

The Court stated that it was the self-executing feature of a statute of limitations that leaves it unaffected by the Fourteenth Amendment's due process requirements.

> "The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." [pp. 486, 487]

In *Pope,* the Court found significant state involvement in the Oklahoma non-claim statute *triggered by publication of notice to creditors,* and therefore the statute was not self-executing and was subject to the due process requirements of the Fourteenth Amendment. These factors are not present in the non-claim provisions of C.R.S. 15-12-801 et seq.

> "The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The non-claim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice;

section 331 directs the executor or executrix to publish notice, 'immediately' after appointment. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to 'immediately give notice to creditors'. The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. Section 332. It is only after all these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." [*Pope*, at p. 487].

"Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. . . . In sum, the substantial involvement of the probate court throughout the process leaves little doubt that the running of Oklahoma's non-claim statute is accompanied by sufficient government action to implicate the Due Process Clause." [*Pope* at p. 487].

In the case before this court, the probate court's involvement is not substantial, if it exists at all. The legal proceedings do not trigger the time bar. Instead, the time bar of C.R.S. 15-12-803 and 804 is triggered by the factors which trigger most statutes of limitation. Regarding claims based upon contract with the personal representative (15-12-803(2)(a)), *the time bar is triggered by the date on*

which performance by the personal representative is due. The probate proceedings have nothing at all to do with triggering the time bar for any other claims such as are enumerated in 15-12-803(2)(b); *the time bar is triggered by the acts which give rise to the claim.*

b. Due process under the Fourteenth Amendment requires no more than actual notice of the pendency of the action. The issue is moot because it is undisputed that plaintiffs had actual notice of the pendency of the estate proceedings.

Assuming only for argument's sake that the due process requirements set forth in *Pope* apply to the non-claim provisions of C.R.S. 15-12-803 and 804, the United States Supreme Court in *Pope* said that state action affecting property must generally be accompanied by actual *notification of that action.*

> "chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper. Creditors, who have a strong interest in maintaining the integrity of their relationship with their debtors, are particularly unlikely to benefit from publication notice." [p. 489, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950)]. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality "is notice reasonably calculated, under all the circumstances, *to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." [p. 484, citing *Mullane*]. [Emphasis supplied].

It is undisputed that plaintiffs had actual notice of the pendency of the estate proceedings when the alleged cause of action arose on June 8, 1988, and so plaintiffs' arguments are, in all material respects, moot. *Texaco Inc. v. Short, supra,* and *Tulsa Professional Collection Services, Inc. v. Pope, supra,* make clear that due process does *not* require notice of the impending expiration of a period of limitations. Petitioners were afforded a fair opportunity to commence litigation. The non-claim statute ran through October 8, 1988, a period of four months from the date respondent delivered, and petitioners accepted, the deed. During practically all of that four month period in which they had to commence litigation, the petitioners were represented by counsel. They did not take advantage of the opportunity to commence litigation by October 8, but they certainly were not denied a fair opportunity to do so.

c. The non-claim period of C.R.S. 15-12-803 is not so short as to deny due process.

In *Matter of Estate of Daigle,* 634 P.2d 71 (Colo. 1981), the Colorado Supreme Court addressed the purpose of the non-claim statute set forth in C.R.S. 15-12-803 and 804 as to promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors.

> "The heirs of a decedent and the devises under a will often have needs which can be satisfied only by an expeditious distribution of property [p. 76]. . . .
>
> The state also has a legitimate interest in providing for the early and orderly distribution

> of a decedent's assets. The non-claim statute effectuates this purpose." [p. 78].

The U.S. Supreme Court in *Pope* expressly rejected an opportunity to address whether Oklahoma's two month period for creditors to submit claims was somehow unconstitutionally short. There is, however, considerable language in the decision indicating support for a limited period to act on claims.

> "Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the administration and expeditious closing of estates." [p. 479] . . .
>
> " . . . At the same time, the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines . . . " [p. 489].

With that reasoning, this court in effect rejected the substance of petitioners' argument that

> "Why should a decedent's successors, in their understandable desire to put the death behind them and get on with life, be given a shorter period of repose than was the decedent? Why should they not take the decedent's property subject to the same liability – and the same time limitations on that liability – as the decedent? If the substantive claim survives, logically so should the procedural statutory limitations that render it valid and enforceable." [page 15 of Petition for Writ of Certiorari].

IV. CONCLUSION

Under Rule 10 of the Supreme Court Rules, a Petition for Writ of Certiorari will be granted only when there are special and important reasons therefore, and the rule enumerates certain specific reasons which characterize the basis on which a petition will be granted. No reasons of that character exist in this case, and, to the extent they may exist, they have already been fully addressed by this court in *Pope* in a manner which dictates against review of the Colorado Court of Appeals decision in this case. The non-claim statute triggered by the date on which performance under the contract was due, or by the acts which gave rise to petitioners' claims, was self-executing and thus does not involve constitutional due process considerations. Nevertheless, *Pope* has already reaffirmed that due process does not require notice of the impending expiration of a period of limitations. The petitioners in the present action were indisputably aware of the pendency of the probate proceedings from the very first day that their alleged claim accrued. They were not denied a fair opportunity to file their claims by the four month non-claim statute. In *Pope*, an important due process question was addressed where a known creditor was barred from bringing a claim before it ever had actual knowledge of the pendency of any probate proceedings. There simply is no equivalent due process issue in the present case. Respondent Eppinger requests that this

Court deny the Petition for Writ of Certiorari.

Dated: August 25, 1992.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS August 29, 1991
No. 90CA0225

Wishbone, Inc., a Colorado corporation; Joseph Lochi and Francis Lochi,

Plaintiffs-Appellants,

v.

Lula M. Eppinger, personal representative of the estate of Wilmer H. Eppinger,

Defendant-Appellee.

Appeal from the District Court of Adams County
Honorable Donald W. Marshall, Jr., Judge
No. 88CV2601A

Division I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Ruland and Dubofsky, JJ., concur

Berger & Berger, Nathan M. Berger, David Berger, Commerce City, Colorado, for Plaintiffs-Appellants

Aisenberg & Kaplan, P.C., Bennett S. Aisenberg, H. Paul Himes, Jr., Denver, Colorado, for Defendant-Appellee

Plaintiffs, Wishbone, Inc., and Joseph and Frances Lochi, appeal the dismissal of their claims by the entry of a summary judgment in favor of defendant, Lula Eppinger, personal representative of the Estate of Wilmer Eppinger. We affirm.

On February 25, 1988, the Lochis and the deceased entered into a receipt and option contract for the sale and

purchase of "Lots 9 and 10, Holly Hurst Subdivision, County of Adams, Two acres more or less." The contract also provided that the property would be sold "with all easements and rights-of-way appurtenant thereto," and would be free and clear of all liens, encumbrances, and easements except "those of record."

The decedent died in March 1988, and defendant was appointed later that month as personal representative to the estate. On June 8, 1988, the personal representative delivered a deed for the subject property to plaintiffs. The deed conveyed "Plots 9 and 10, Except that portion conveyed to the Department of Highways in Deed recorded August 11, 1961 . . . and except that portion dedicated to the Public in right of way dedication recorded August 28, 1972. . . . "

Plaintiffs accepted the deed and tendered the purchase price as agreed. They claim that later that day they discovered that only 1.711 acres was actually conveyed, such being less than the two acres specified in the contract.

On July 6, 1988, plaintiffs presented to the personal representative their claim against the estate in which they requested an abatement to reflect the alleged deficiency between the deed tendered and the conveyance agreed upon in the contract. On July 15, 1988, defendant's attorney responded to plaintiffs' letter in what the trial court determined was notice of disallowance of the claim.

The letter informed plaintiffs "that you do not have grounds for any lawsuit against the estate." The letter, however, contained no notice that, pursuant to § 15-12-806(1), C.R.S. (1987 Repl. Vol. 6B), there was a 60-

day time limit for them to file their claim with the district court. Plaintiffs filed their claim in district court on December 30, 1988.

I.

Section 15-12-806(1) provides, in pertinent part, that any claim disallowed by the personal representative is barred:

> "unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance . . . if the notice warns the claimant of the impending bar."

Under § 15-12-806(2), C.R.S. (1987 Repl. Vol. 6B), the court may allow, in whole or in part, any claim presented to the personal representative or filed in due time with the court upon petition of the personal representative or claimant if such claim is not barred by § 15-12-806(1).

The question presented here seeks a determination of the effect, under the non-claim statute, § 15-12-801, et seq., C.R.S. (1987 Repl. Vol. 6B), of the personal representative's failure to provide notice of the applicable 60-day time bar in her notice disallowing claims against the estate.

Plaintiffs argue that the timely presentment of their claims to the personal representative pursuant to § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B) vested the trial court with jurisdiction and arrested the application of the non-claim statute. Plaintiffs further argue that the personal representative's noncompliance with the non-

claim statute, by her failure to notify plaintiffs of the 60-day time bar contrary to § 15-12-806(1), in effect tolled the non-claim statute. Hence, they conclude that this failure to trigger the provisions of the non-claim statute invokes either a three or two-year statute of limitations otherwise applicable to plaintiffs' claims, §§ 13-80-101 and 13-80-102, C.R.S. (1986 Repl. Vol. 6A).

Plaintiffs contend that to reach another result would render § 15-12-802, C.R.S. (1987 Repl. Vol. 6B) meaningless. We, however, conclude that the result sought by plaintiffs is contrary to Colorado authority and inconsistent with the purposes of the Colorado Probate Code.

Generally, a claim is allowed by failure of the personal representative to disallow it. *In re Estate of Hamilton v. Egan*, 633 P.2d 1100 (Colo. App. 1981). And, a claim which is defectively or improperly disallowed is treated as though it were allowed. *See In re Estate of Roddy*, 784 P.2d 841 (Colo. App. 1989).

There is no dispute here that the personal representative failed to notify plaintiffs of the time bar as required under the statute. However, the failure to provide notice of the applicable time limitation did not render the disallowance itself defective. Rather, the issue to be determined is the time bar now applicable to plaintiffs' claims.

The non-claim statute provides that the commencement of any proceeding on a claim must occur within the time limited for presenting the claim, which in this case is four months from when defendant's performance was due. Section 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *see* § 15-12-803(2)(a), C.R.S. (1987 Repl. Vol. 6B). And, although the 60 days in which to commence a proceeding

after the mailing of notice of disallowance may be extended by the court or personal representative, any extension may not "run beyond the applicable statute of limitations." Section 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B).

Section 15-12-802 instructs as to the applicable limitations and provides, in relevant part:

> "For purposes of any statute of limitations other than those limitations specified in §§ 15-12-801, 15-12-803, 15-12-804, and 15-12-806, the proper presentation of a claim under § 15-12-804 is equivalent to commencement of a proceeding on the claim."

Contrary to plaintiffs' assertions, and even if we assume the inapplicability of the 60-day time limit in which to commence claims, this language does not indicate a departure from the applicable time limits under the non-claim statute for claims brought *against the estate. See In re Estate of Wehling,* 37 Colo. App. 276, 547 P.2d 1289 (1976), *aff'd sub nom. Kropp v. Farmers Insurance Exchange,* 193 Colo. 144, 563 P.2d 943 (1977) (time limitations under Colorado Probate Code do not apply to actions *on liability insurance policies* issued to the decedent).

Section 15-12-803 provides a four-month period in which all claims against the estate must be filed. *See In re Estate of Daigle,* 634 P.2d 71 (Colo. 1981). Failure of plaintiffs' to file a claim that could be considered within that period removed jurisdiction from the trial court to consider that claim. *In re Alperstein v. Sherwood International, Inc.,* 778 P.2d 279 (Colo. App. 1989). And, this time limitation of four months is "much shorter than, and supersedes, all statutes of limitation which might otherwise

have been applicable." *In re Estate of Scott*, 735 P.2d 924 (Colo. App. 1987).

The basic purpose of the Colorado Probate Code is to promote the speedy and efficient settlement of estates. As such, the time limit under the non-claim statute for presentation of a claim is jurisdictional in character. *In re Estate of Daigle, supra; Strong Brothers Enterprises, Inc. v. Estate of Strong*, 666 P.2d 1109 (Colo. App. 1983).

Compliance with the non-claim statute is a condition precedent to the enforcement of a right of action, as opposed to its remedy. Failure to comply with the non-claim statute bars claims asserted after its expiration and deprives both the trial court and reviewing court of jurisdiction over the subject matter of the claim. *In re Estate of Randall v. Colorado State Hospital*, 166 Colo. 1, 441 P.2d 153 (1968); *In re Estate of Plank v. Plank*, 32 Colo. App. 126, 509 P.2d 812 (1973).

Based upon the foregoing analysis, we conclude that the mandatory warning invokes the 60-day time bar only, and failure to give such notice affects only that time bar. *See* § 15-12-806(1). Since it cannot be said here that the failure to warn of the 60-day time bar defeated the substance or intended effect of the notice of disallowance, failure of defendant to comply strictly with this notice requirement only relieves plaintiffs of the requirement to file their claim seeking allowance within 60 days. *See* § 15-12-804(3), C.R.S. (1987 Repl. Vol. 6B) (60 day limit may be extended).

Plaintiffs' claims, therefore, are, by virtue of § 15-12-809(2), barred under the non-claim statute for failure file them within the applicable four-month period.

Plaintiffs have cited no case law or policy to support their contention that a failure to provide notice of the 60-day time bar removes their claim from the requirements and policies of the probate code or implicates the general statutes of limitation. Moreover, a non-claim statute is not a statute of limitations, *In re Estate of Randall, supra,* and to employ such a construction would frustrate the statutory goal underlying the distribution of estates. *In re Estate of Daigle, supra.* Since it affects the jurisdiction of the court to act, it is an absolute bar which cannot be tolled or waived, either intentionally or by implication. *In re Estate of Scott, supra; Barnhill v. Public Service Co.,* 649 P.2d 716 (Colo. App. 1982).

Here, plaintiffs' claim was required to be filed within four-months after performance by the personal representative was due, or by October 8, 1988. *See* §§ 15-12-803(2)(a) and 15-12-804(2), C.R.S. (1987 Repl. Vol. 6B); *In re Estate of Scott, supra.* Failure to have done so bars plaintiffs' claim against the estate.

II.

Plaintiffs contend that the application of the non-claim statute violates their rights to due process since they were given no actual notice regarding the operation of the non-claim statute.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), upon which plaintiffs rely here, is inapposite. The non-claim statute at issue in *Tulsa* involved substantial state action. The probate court was significantly involved throughout

the probate proceedings, and the time bar was activated by that involvement.

By contrast, the non-claim statute here is self-executing in that it is not triggered by legal proceedings, but automatically lapses upon the expiration of the statutory period. Given this self-executing feature, the lack of prior actual notice to plaintiffs of the operation of the statute does not constitute a deprivation of due process. *See Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

Also without merit is plaintiffs' contention that the statutory time period is too limited to have afforded plaintiffs due process. The government has an interest in the speedy and efficient settlement of estates, *In re Estate of Daigle, supra*, and plaintiffs are presumed to have knowledge of the relevant statutory provisions from the General Assembly's enactment of the statute. *See Texaco, Inc. v. Short, supra; see also Dove v. Delgado*, 808 P.2d 1270 (Colo. 1991) (two-year period for filing negligence action not so short as to deny due process).

III.

Plaintiffs' final contention is that the trial court erred in determining, contrary to the intent of the parties, that the contract merged into the deed. We find it unnecessary to resolve this issue given the bar to plaintiffs' claim against the estate.

Judgment affirmed.

JUDGE RULAND and JUDGE DUBOFSKY concur.